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IN THE COURT OF APPEALS OF INDIANA

CLINTON HERNANDEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0712-CR-1025
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol Orbison, Judge
The Honorable Amy Barbar, Magistrate
Cause No. 49G22-0705-FB-82775

June 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Clinton Hernandez appeals his twenty-six-year sentence imposed following his plea of guilty to class B felony burglary, class A misdemeanor carrying a handgun without a license, class D felony striking or interfering with a law enforcement animal, two counts of class D felony resisting law enforcement, class D felony possession of a controlled substance, and class A misdemeanor possession of marijuana. We affirm.

The facts most favorable to the trial court's judgment indicate that on May 10, 2007, Sharon Jordan returned to her home on Moonstruck Parkway in Marion County and noticed an unfamiliar red Chevrolet Blazer parked in her driveway. Jordan observed Hernandez exit her home, enter the red Blazer, and drive away. Jordan notified the police, and soon thereafter police officers converged on the Blazer, signaling for it to stop. Hernandez refused to stop and led the police on a fourteen-minute pursuit that ended with Hernandez driving the vehicle into a field and attempting to flee on foot. Officers ordered Hernandez to stop, and when he did not, released the canine unit. The canine seized Hernandez, who, after falling to the ground, pointed his handgun at the animal and fired two fatal shots. After Hernandez regained his feet, officers again ordered him to stop, at which point Hernandez aimed his handgun at the officers. An officer then fired his handgun at Hernandez, but missed. After running into a yard on East Southern Avenue, Hernandez again aimed his handgun at officers, who again fired their weapons at Hernandez, this time striking him. Police then arrested Hernandez and took him to the hospital. At the time of his arrest, Hernandez had on him prescription medication taken from the Jordans' home, as well as marijuana. Jewelry, prescription medications, and weapons taken from the Jordans' home were subsequently

found in the Blazer. In a taped statement, Hernandez admitted to burglarizing the Jordans' home, leading the police on a pursuit, and shooting the canine.

On May 21, 2007, the State charged Hernandez with class B felony burglary, class D felony theft, class A misdemeanor carrying a handgun without a license, class D felony striking or interfering with a law enforcement animal, class A misdemeanor pointing a firearm, two counts of class D felony resisting law enforcement, class D felony possession of a controlled substance, class A misdemeanor/class D felony possession of marijuana, and class A misdemeanor driving with a suspended license.

On September 26, 2007, the two parties entered into a plea agreement, wherein the State agreed to drop the class D felony theft, class A misdemeanor pointing a firearm, and class A misdemeanor driving with a suspended license charges, and Hernandez agreed to plead guilty to the remaining charges. The plea agreement also called for a cap of twenty years of imprisonment on the executed sentence. On October 10, 2007, the trial court accepted the guilty plea and sentenced Hernandez to a total of twenty-six years of imprisonment, with six years suspended and four years of probation. This appeal ensued.

Hernandez first contends that the trial court abused its discretion by failing to acknowledge his lack of prior violent offenses and substance abuse problem as mitigating factors. So long as it is within the statutory range, a sentencing decision is subject to review on appeal for an abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218. An abuse of discretion occurs if the decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable,

probable, and actual deductions to be drawn therefrom." *Id*. (citations and quotation marks omitted).[1]

At the sentencing hearing Hernandez advanced four mitigators for the trial court's consideration: his guilty plea, age, lack of prior violent offenses, and substance abuse issues. The trial court accepted his guilty plea and age as mitigating circumstances, but refrained from acknowledging the remaining factors. A trial court is not obligated to find a circumstance to be mitigating merely because the defendant advances it. *Felder v. State*, 870 N.E.2d 554, 558 (Ind. Ct. App. 2007). The trial court need only identify mitigating circumstances that it finds to be significant, and if the trial court does not find the existence of a mitigating factor after it has been argued by counsel, the trial court is not obligated to explain why it has found that the factor does not exist. *Anglemyer*, 868 N.E.2d at 493. On appeal, the defendant must show that the proffered mitigating circumstance is both significant and clearly supported by the record. *Felder*, 870 N.E.2d at 558.

Regarding his prior offenses, Hernandez has a criminal history that includes felony convictions for theft and burglary, as well as multiple misdemeanor convictions for possession of marijuana, and a probation revocation. Although Hernandez's prior offenses were not violent, the current offenses certainly are. With respect to his history of substance abuse, we note that a defendant's history of substance abuse is sometimes found to be an aggravator, not a mitigator. *See Roney v. State*, 872 N.E.2d 192, 199 (Ind. Ct. App. 2007), ("A history of substance abuse may constitute a valid aggravating factor."), *trans. denied*.

[1] To the extent Hernandez asserts that the trial court was required to weigh and balance aggravators against mitigators, we note that the trial court has no obligation to do so. *See Anglemyer*, 868 N.E.2d at 491.

Moreover, the pre-sentence report suggests that Hernandez had adequate opportunities to address his substance abuse problems, but failed to do so successfully. In light of these facts, the trial court did not abuse its discretion in failing to cite his lack of prior violent offenses or history of drug use as mitigating factors.

Hernandez next contends that the trial court improperly found the nature and circumstances of the offenses aggravating because they are actually elements of the offenses. We do not find this argument persuasive. While a material element of a crime may not be used as an aggravating factor to support an enhanced sentence, *Ellis v. State*, 707 N.E.2d 797, 804 (Ind. 1999), when evaluating the nature of the offense, the trial court may properly consider the particularized circumstances of the factual elements as aggravating factors. *McCarthy v. State*, 749 N.E.2d 528, 539 (Ind. 2001). Here, the trial court noted that Hernandez engaged in a fourteen-minute vehicle pursuit in a residential area, burglarized someone's home in the middle of the day, drew his gun in the presence of police officers, and fatally shot a police dog. These statements encompass much more than the elements of the crimes. Therefore, the trial court did not abuse its discretion in considering the particularized circumstances of the crimes as an aggravator.

Lastly, Hernandez contends that the trial court abused its discretion in sentencing him to consecutive terms. The decision to impose consecutive sentences for multiple offenses is generally within the trial court's discretion. *Kilpatrick v. State*, 746 N.E.2d 52, 62 (Ind. 2001). In order to impose consecutive sentences, the trial court must find at least one aggravating circumstance. *Plummer v. State*, 851 N.E.2d 387, 390 (Ind. Ct. App. 2006).

Here, the trial court found several aggravating circumstances and therefore did not abuse its discretion in imposing consecutive sentences.

Affirmed.

BARNES, J., and BRADFORD, J., concur.